

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

In the

UNITED STATES COURT OF APPEALS
For the Second Circuit

76-1146

B
P/S

Doc. #: 75 Cr. 275
Doc. #: 76-1146

UNITED STATES OF AMERICA,
Appellee,
v.

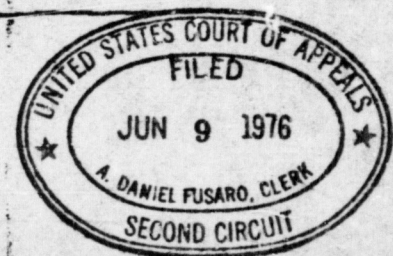
CHARLES FORBES,
Appellant.

Appeal from the Judgment of Conviction in the
United States District Court for the Eastern
District of New York.

Sat Below: Jacob Mischler, U.S.D.J.
and a jury.

BRIEF AND APPENDIX FOR APPELLANT

CHARLES DE FAZIO III
Attorney for Appellant
922 Washington St.
Hoboken, N.J. 07030



PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF FACTS	1
ARGUMENT	
<u>POINT ONE</u>	5
GOVERNMENT'S CONSTANT ATTEMPT TO INTER- JECT INTO THE PROOFS EVIDENCE OF THE THEFT OF A MOTOR VEHICLE IN MAY OF 1972 CAUSED IRREPARABLE PREJUDICE TO THIS DEF- ENDANT AND SHOULD NECESSITATE THE SETTING ASIDE OF THE JURY VERDICT OF GUILTY.	
<u>POINT TWO</u>	8
THE FAILURE OF THE MAIN GOVERNMENT WIT- NESS , FLEISCHER, TO INFORM THE COURT AND JURY THAT THE GOVERNMENT WAS TO SUPPLY HIM WITH ANEW IDENTITY AND RELOCATION TO ANO- THER PART OF THE COUNTRY FOR HIM AND HIS FAMILY SHOULD BE GROUNDS FOR A NEW TRIAL.	
<u>POINT THREE</u>	10
TESTIMONY AS TO A SUBSEQUENT CRIME PRE- JUDICED THE DEFENDANT	
<u>POINT FOUR</u>	13
THE GOVERNMENT SHOULD NOT HAVE BEEN PER- MITTED TO ARGUE THAT THE DEFENDANT MADE AN EXCULPATORY STATEMENT LATER PROVED TO BE FALSE	
<u>POINT FIVE</u>	14.
THE ATTEMPT BY THE GOVERNMENT TO CHARAC- TERIZE DETECTIVE DE CARLO'S TAKEING OF A CUP OF COFFEE AT THE DEFENDANT'S PLACE OF BUSINESS TO THE TAKING OF A BRIBE SHOULD BE GROUNDS FOR A REVERSAL OF THE VERDICT OF GUILTY, SINCE IT WAS HEARD BY THE JURY AND HAD TO PREJUDICE THE DEFENDANT.	
<u>POINT SIX</u>	15.
FLEISCHER'S EVICENCE AGAINST FORBES SHOULD HA E BEEN SUPPRESSED OR AT THE VERY LEAST A CAUTIONARY AND ADMONITORY INSTRU- TION SHOELL D HAVE BEE GIVEN TO THE JURY.	

APPENDIX

PAGE

INDICTMENT

i.

ii

RECORD OF DOCKETING

iii

CHARGE TO JURY

iv.

TABLE OF CITATIONS

Cases cited;

U.S. V. SUTHERLAND, C.A. Texas, 1971,
442 F.2nd 542, cert. denied 404 U.S. 833. 10

STATE V. BALDWIN, 47 N.J. 379 (1966), cert.
denied 385 U.S. 980. 11

U.S. V. HERNANDEZ, C.A. Ariz. 1973, 480
F.2nd 1044. 13.

U.S. V. MARQUEZ, C.A.N.Y. 1970, 424 F.2d
236, cert. denied 400 U.S. 828. 15.

U.S. V. KLEIN, C.A. Ariz. 1973, 472 F.2d 847 15.

Statutes Cited:

18 U.S.C. 371

10.

STATEMENT OF FACTS

In the case at bar the defendant CHARLES FORBES was indicted on one count said indictment being returned in late 1975 under U.S.C. 371, for conspiracy to commit interstate theft of a motor vehicle allegedly occurring on March 3, 1972.

The defendant first became aware that he was a suspect in this case in April of 1975 when he was served with a subpoena issuing out of the United States Attorney's Office for the Eastern District of New York. (Tr. p. 307, 11.1-5) The defendant appeared with counsel and discussed the matter in the Office of E. Levin Epstein, Assistant United States Attorney, and at that time informed Mr. Levin Epstein that he had no knowledge whatsoever of the matter, but did tell the United States Attorney after being presented with certain photographs that he recognized two men whose pictures were depicted in said photographs, to wit: one Charles Peters and one Paul Fleischer. (Tr. p. 325, 11.13) Paul Fleischer it was later determined had turned government witness against certain members of a truck highjacking ring whose participation in said highjackings went back to 1968 and earlier.

Mr. Forbes testified on the witness stand that his knowledge of these men derived from his operation of a truck repair shop and garage at 5515 Tonnele Avenue, in the Township of North Bergen, County of Hudson and State of New Jersey. He further testified that Peters and Fleischer came to his place of business in late 1971 or thereabouts, had stopped in and had conversations with him concerning the truck repair business and the fact that they would like to give him certain repair business in the future.

There was also incidental conversation concerning the

weather and things of that nature. (Tr. pp. 326-328). Mr. Forbes vehemently maintained his innocence of any other conversation concerning using his shop as a drop for either a stolen motor vehicle or goods stolen in interstate commerce, and maintained his complete innocence from April of 1975 when he was first notified of his potential involvement to the very date of trial when he testified to that fact. (See Forbes testimony) Parenthetically Fleischer the only witness against Forbes in this case who directly tied Forbes to the conspiracy testified that he had discussed with Forbes the use of his premises as a drop in the event a suitable opportunity arose during the gang's highjacking operations.

Forbes testified before the Grand Jury completely as to whatever knowledge he had of Fleischer and Peters as aforementioned.

He also gave a written statement subsequent to trial of 1975 to the United States Attorney and also allowed himself to be photographed for whatever use the Government might have for said photographs.

It also appeared that round the time of the highjacking in question of March 1972, Forbes had in his employ one Gerald Barry, who was earning money doing part time work for Forbes in as much as he was in some financial distress at the time. Barry was also a distant relative of Forbes' wife and his duties were to drive the tow truck, to pick up disabled vehicles and do general handy work around the shop for which Forbes paid him approximately \$100.00 or so per week.

The only other involvement linking Forbes with this crime other than Forbes testimony concerning his conversations with Fleischer in North Bergen, was a telephone call which Fleischer

states was placed to Forbes place of business on March 3, 1972, at or about the time of the highjacking and theft of that particular truck known as the Arleen Knitwear truck by another member of the gang, one Addolario, requesting Forbes to send a tow truck to Manhattan, specifically on West Street, near the Federal House of Detention, where the stolen truck had broken down. There is no question that a phone call was made to Forbes place of business on that date as was introduced in evidence through the records of the New York - New Jersey Telephone Companies, from a certain phone in Manhattan and that a return call was made from Forbes place of business to the number in Manhattan.

Forbes denies that he ever received any such call to dispatch a tow truck to Manhattan on that date although he states that it is possible that one of his men received a call and dispatch Barry to the location as a large portion of Forbes business was tow truck operations, both truck and auto.

However Forbes maintains that he has no knowledge of Barry going to Manhattan on that date and was totally unaware of it until sometime in April of 1975 when the United States Attorney brought it to his attention.

Therefore it is respectfully submitted that the facts in this case other than those given by the convict and admitted thief, Paul Fleischer, is the telephone call.

In as much as this was an indictment the major portion of the rest of the evidence introduced by the Government had to do with Fleischer testifying as to numerous conversations which he had with other members of the gang in Brooklyn for the most part and also in Manhattan which under the law of conspiracy was admissible as against Forbes under the theory of co-conspiratorship.

NO EVIDENCE
FBI
JUL 10 1971

No evidence was introduced and it is fairly well admitted that Forbes was never in Brooklyn at any time with any members of the gang nor was he in New Jersey with any members of this gang with the exception of Peters and Fleischer coming to his place of business as aforementioned in late 1971, and as Forbes testified for completely innocuous reasons.

Fleischer, an admitted thief and felon, presently incarcerated for three years under a sentence given by the Hon. Judge Platt, for crimes arising out of this particular incident and indictment, was the only witness produced against Forbes who in any way directly tied him to this conspiracy.

Forbes introduced testimony as to his clean background, that he was a man of approximately 56 years of age, never in any prior involvement with the law, served honorably with the United States Navy in the Second World War in various theaters, and participated in numerous operations in the Pacific, had been a garage, auto and truck mechanic for over 25 years, had an excellent reputation for honesty and truth telling, and also brought in various members of the community including a detective of the North Bergen Police Department, a life insurance salesman who was and is a close friend, and others to testify as to his good reputation in the community.

Nevertheless the jury convicted Forbes on the one count of conspiracy indictment.

STATEMENT OF LAW

POINT I

The government's constant attempt to interject into the proofs evidence of the theft of a motor vehicle in May of 1972 caused irreparable prejudice to this defendant and should necessitate the setting aside of the jury verdict of guilty.

The defendant moved for a mistrial in this cause during the direct examination of the witness Lozett on the ground that the government was attempting to link Forbes to a certain highjacking which had occurred in May of 1973, which truck contained brassiers based on the simple fact that said truck was found approximately five miles from the defendant's place of business on Tonnele Avenue, North Bergen, N. J. Prior to the making of that motion the government had admitted through the witness Fleisher to also bringing in evidence of that particular highjacking in May of 1972. Upon objection by the defendant's attorney, Fleisher's testimony was forestalled even though material had been brought to the attention of the jury. The May 1973 highjacking had absolutely nothing to do with Forbes, was not in any way a count in the indictment against Forbes nor was it even a count in the indictment against Fleischer known as Indictment 72 CR 1297, which indictment against Fleischer only spoke about an incident occurring March 3, 1972. The timely motion for a mistrial was heard by the trial judge who asked the attorney for the government why this type of testimony was being introduced in the case and whether the government "has testimony to show that the container was delivered in Mr. Forbes place of business. (See Tr p. 288, lines 13 to 15).

- 5 -

123
The container alluded to by the trial judge was the truck which was highjacked in May of 1972. To the question the government attorney stated as follows: "I have no testimony, except Mr. Fleischer, your Honor, to show it was actually delivered to the Forbes place of business." (Tr. p. 288, lines 16 to 18).

The Court then said: "Did he testify it was delivered?" This question alluded to Fleischer testifying that the container was actually in Forbes place of business. (Tr. p. 288, line 19)

Then the government attorney stated "There is no testimony that actually puts the container inside Forco's Truck Rental." (Tr. p. 288, lines 20 to 22)

The Court then stated: "How close was it?" (Tr. p. 288, line 23)

The Government attorney responded "approximately 5 miles away. It was recovered in an empty and abandoned condition." (Tr. p. 288, lines 24, 25)

The Court then at that point stated as follows: "I do not understand you weren't ready to prove that the goods weren't found in Mr. Forbes possession. When I denied the government Mr. Fleischer testimony about what they told, didn't you realize that that might effect your right to prove a similar act?"

The Court further stated "and I still say it is inadmissible. But having made that ruling didn't you understand this testimony would be irrelevant?" (Tr. p. 289, lines 9 to 21)

The Court then further amplified on what the Government was attempting to do concerning the May highjacking of the truck was not the brassiers by saying "... you want me to permit you to say that a container was found five miles from Mr. Forbes place of

business to prove that he did, in fact, have possession of it?" (Tr. p. 290, lines 19 to 23).

And the Government persisted that it did. (Tr. p. 290, lines 24 to 25)

The above colloquy must be taken in the context of the fact that the government from its opening statement and continuing throughout the entire testimony which it adduced, attempted to bring in the fact of a May 1972 highjacking which had absolutely no relationship, no materiality, no relevance whatsoever to Forbes.

The government's opening statement was quite specific that it would show a subsequent act linking Forbes to the March 1972 Arleen Knitwear highjacking in the City of New York and persisted through the testimony of Fleischer to try to bring this before the jury up to and including the testimony of Lowett, the witness we are not discussing, at which time the aforementioned motion for a mistrial was made.

The highly prejudicial nature of this continuing attempt to bring this before the jury is particularly damaging and devastating to the defendant Forbes because the only evidence that the Government had linking him with the truck highjacking in March of 1972 was the testimony of Fleischer that a phone call had been made to Forbes to dispatch a tow truck to New York. No container was ever even alluded to being in Forbes place of business at any time and Forbes defense was that he knew nothing whatsoever of a March 3, 1972, highjacking nor had he ever participated in any conversations with Fleischer or Peters concerning the use of his place of business as a drop. The mere fact that the jury was exposed to this kind of testimony and this kind of argument by the government concerning a subsequent highjacking, needless to say,

- 7 -

placed the defendant in an extraordinary adverse light made particularly bad by the fact that Forbes had no way to rebut or defend against this type of evidence.

The court refused to grant a mistrial stating on Tr. p. 291, lines 7 to 9, that the record to the May highjacking was non-prejudicial.

It is respectfully argued that this was extremely prejudicial and that this continuous pattern of attempting to introduce this type of evidence forestalled defendant from having a fair trial.

As a matter of fact when reference was originally made to this particular similar act that the May highjacking, the attorney for the defendant, immediately desired to know whether this could be tied up with the defendant and at that point it was alluded to the fact that it could be tied up.

Not only was it not tied up at any time during the course of the trial but was left hanging for the jury to do with as it wished.

POINT II

The failure of the main government witness Fleischer to inform the court and the jury that the government was to supply him with a new identify and relocation to another part of the country should be grounds for a new trial in this matter.

During the government's direct examination of Fleischer various questions were asked of him both on direct and cross concerning any arrangements he may have made with the government in

consideration for his testimony. The court also directed certain questions to Fleischer concerning this. Fleischer failed to inform the Court and the jury of the government's compromise to give him a new identity and to relocate him and his family after his release from prison.

It must be remembered that Fleischer had testified in two previous trials against other members of the conspiracy and this was his final appearance, it being the third trial in this matter. When one realizes that Fleischer first mentioned the name of Charles Forbes in 3500 material in April, 1975, it can be seen that every possible reference to the arrangement he had made with the government was of the greatest importance going towards his motivation for bringing people into this conspiracy who may in fact have been innocent especially with regard to Forbes.

It is especially interesting to note that the first series of questions asked of Fleischer by the Government on this direct examination had to do with his previous convictions and arrests and had to do with the fact that certain counts with certain indictments were to be dropped against him and certain charges which could have been preferred against him were never preferred presumably as consideration for his testimony. However, there was absolutely no questioning by the government with regard to the issue of new identity and location.

It is respectfully submitted that this was prejudicial error and caused the defendant to not have a fair trial. (See Tr. pp. 160-185).

POINT THREE

TESTIMONY AS TO A SUBSEQUENT CRIME PREJUDICED THE DEFENDANT.

The crime charged against this defendant was violation of 18 U.S.C. 371, conspiracy. The essential elements needed to show violation of this section are an agreement to commit the offense against the United States coupled with an overt act by one or more of the conspirators. U.S. V. SUTHERLAND, C.A., Tex., 1971, 442 F.2nd 542, cert. denied 404 U.S. 833.

In the instant case the attorney for the government should not have been permitted to comment upon a hijacking which allegedly occurred in May 1972, with the container being found five miles from the defendant's place of business as aforementioned and as shown by the transcript, as it was in no way related to this defendant nor to the crime that he was charged with, to wit, conspiracy to participate in the March 3, 1972 hijacking of the Arline Kintwear Truck in Manhattan. Nevertheless this matter was referred to throughout the trial, and in the government's opening statement to the point where a motion for a mis-trial based on exactly this problem was raised and denied by the trial judge on the ground that it was non-prejudicial, (see supra transcript reference).

What the government was in effect attempting to do with this May 1972 incident is patently clear, that is, to bring to the jury's attention a pattern related to this defendant, or in other words admission of other crime evidence, therefore, to show the defendant in a bad light or raise the inference of bad character.

This is especially critical to the defendant when it is recalled that other than the testimony of ~~one~~ Fleischer there was no evidence of the defendant's knowledge of these other conspirators mentioned at the trial. Naturally, Fleischer's testimony as to extrajudicial statements of the other conspirators as related to Forbes was admissible under the exception to the hearsay rule vis a vis a conspiracy case. U.S. V. WILKERSON, C.A. Texas, 1972, 469 F.2d 963, cert. denied 410 U.S. 986. If the jury had only to deal with Fleischer's testimony as to Forbes' alleged involvement in one isolated criminal transaction, knowing full well that Fleischer was an admitted felon, and that Forbes had a clean record, instead of also having this red herring of May 1972 brassiere hi-jacking in front of them, the verdict would in all likelihood been that of an acquittal.

However, the government wished to hedge its bets in this case by introducing other criminal acts which they hoped the jury would tie to the defendant Forbes. This could be conceivably accomplished through Fleischer since he was an admitted member of a certain hi-jacking group which had committed other crimes prior to March 3, 1972. However since Forbes was in no way linked by Fleischer to any transactions pre-dating March of 1972 but only to the incident of that date through (a) Fleischer's statements, and (b) by the telephone to Forbes' place of business on March 3, 1972 at approximately 11 A.M. which someone returned to the telephone in New York where the call had originated some thirty minutes later, the government attempted and did bring to the jury's attention the May 1972 discovery of a container from a hi-jacked truck some five miles from Forbes' place of business.

This constant allusion to the brassiere hijacking of May 1972 could have been introduced by the government with no other purpose in mind than to prejudice this defendant, for there was absolutely no evidence in the case linking Forbes with the May discovery of the container.

It is difficult enough to defend a man in a conspiracy case when an informer is allowed by the rules to utter extrajudicial statement throughout the trial, uncorroborated as they may be, but to be faced with the introduction of this type of testimony of a completely irrelevant hi-jacking makes the defense well nigh impossible.

This evidence was introduced by the government under two theories (a) proof of defendant's bad character (b) proof of a fact in issue in the case. The issue in this case was simply whether Forbes was a member of a conspiracy to hi-jack the Arline Knitwear truck on March 3, 1972. Fleischer said Forbes was a member and Forbes denied it. The introduction of other evidence of other crimes completely unsupported as in this case, would, it is submitted, materially prejudice the defendant. *STATE v. BALDWIN*, 47 N.J. 379 (1966), cert. denied 385 U.S. 980. It has been said that other crime evidence should be admitted only where it has a real legal relevance to the action independent from its tendency to show a particular person to be generally disposed toward wrongdoing. See *Supra*.

INLL EZE
CONF

In conclusion when one recalls that the court, on defendant's motion for a mistrial, during the testimony of one Lowett, (Tr. p. 286) refused to allow the government to continue any further with reference to the May 1972 hi-jacking due to the government's inability to link it to the defendant; and when one recalls the governments's assestion to the trial judge early in the trial that it would be linked up and when one recalls the government's allusions to this May 1972 cr me in its opening; it is submitted the motion for mis-trial should have been granted. There was no way for the government to overcome it, that is to say to remove from the minds of the jury the repeated references to this May 1972 incident and there was no way the defendant could have rebutted it. The substantial prejudice ensuring therefrom was enough to deprive defendant of a fair trial.

THE GOVERNMENT SHOULD NOT HAVE BEEN PERMITTED TO ARGUE THAT THE DEFENDANT MADE AN EXCULPATORY STATEMENT LATER PROVED TO BE FALSE.

During the cross-examination of Forbes he was shown certain photographs which he had previously been shown in March 1975 at his initial conference with the government. (Tr. P. 350-355) At that time an Agent Redman showed him certain photographs of one Charly Peters and Fleischer. Forbes recognized Peters but did not recognize Fleischer and so stated. Some four days later at an interview with the government attorney in his office, in the presence of attorney for defendant, Forbes was shown other photographs of various men. Forbes recognized Peters and also Fleischer.

Forbes throughout the course of the investigation and his cooperation with the government commencing in March 1975, maintained in his statements, his grand jury testimony and his trial testimony that Peters and Fleischer even though stopping at his shop in early 1972 for coffee and conversation, were people of no consequence and that his recollection of them was vague (Tr. p. 361). He also explained that he , when shown Fleischer's photograph by Agent Redman on March 14, 1975 was shown a black and white photograph and he remembered Fleischer as having red hair. On March 18, 1975, after time for reflection about these two men the government was interested in recalled Fleischer upon being presented with the photographs again and other photographs of Fleischer.

To allow the government from this to argue to the jury that Forbes made exculpatory statements later proved to false and showing a consciousness of guilty is and was highly prejudicial, especially in light of defendant's explanation of the nature of his recollection. Defendant had not been charged with any crime in March of 1975, as a matter of fact , he was, in concert with his counsel, attempting to cooperate in every way with the government's investigation which spanned a period of time almost four years distant. U.S. V. HERNANDEZ, C.A. Ariz. 1973, 480 F.2nd 1044.

THE ATTEMPT BY THE GOVERNMENT TO CHARACTERIZE DETECTIVE DE CARLO'S TAKING OF A CUP OF COFFEE AT THE DEFENDANT'S PLACE OF BUSINESS TO THE TAKING OF A BRIBE SHOULD BE GROUNDS FOR A REVERSAL OF THE VERDICT OF GUILTY, SINCE IT WAS HEARD BY THE JURY AND HAD TO PREJUDICE THE DEFENDANT.

Detective Vincent De Carlo of the North Bergen Police Department was called to the witness stand as a character witness for the defendant. (Tr. P. 379, et. seq.). He was also called as a factual witness to describe the defendant's place of business and with regard to defendant's garage being a New Jersey Motor Vehicle impounding yard. (Tr. p. 379, et. seq.).

During the cross examination by the government the following question was asked (Tr. P. 387, l. 2) " Did you ever hear the phrase, "on the arm"? A. " Yes, sir" Q. You know what it means; don't you?" A. " Yes, sir. " Q. What does it mean?"

A."Something for nothing , sir " This was in reference to Mr. De Carlo having coffee at herbes place of business.

The Court said (Tr. p. 387 ll. 13-14)"Strike it out. Disregard that. Highly improper." And then the court said to the government attorney (Tr. p. 389-390, ll., 24-25; ll. 1-10)

" I might say that I am appalled at the conduct of your examination. You are acting like a defendant, counsel. Now, because a police officer comes to the stand does not mean that you have the right to be abusive. That is number one. I can't say that to defendant's counsel, but I am saying that to you. You are trying to say that because this police officer took a cup of coffee that it was so-called " on the arm"; is that what you are saying?".

The colloquy of the coffee analogized to a bribe continued to the point where in the presenee of the jury the government attorney made a formal apologh (Tr. p. 392 - 394.

However, the damage was done, and the seed implanted in the jury's mind that this police officer was a bribe keeper. This defendant once again could not have a fair trial.

MILLERS FALLS
E27P AC
FLEISCHER'S EVIDENCE AGAINST FORBES SHOULD HAVE BEEN SUPPRESSED OR AT THE VERY LEAST A CAUTIONARY AND ADMONITORY INSTRUCTION SHOULD HAVE BEEN GIVEN TO THE JURY WITH REGARD TO AN ACCOMPLICE'S TESTIMONY AND THE WEIGHT TO BE GIVEN IT WITHOUT ANY OTHER SUBSTANTIAL PROOF OF DEFENDANT'S GUILT.

Independent evidence of membership in conspiracy is needed to ground decision to admit hearsay declaration by coconspirators. U.S. V. MARQUEZ, C.A.N.Y., 1970, 424 F.2d 236, cert. denied 400 U.S. 828. In this case there was absolutely no independent evidence of defendant's participation in the March 3, 1972 hijacking of the Arline Knitwear Truck. Fleischer was the only witness against Forbes and through his testimony all types of hearsay was allowed against Forbes including many conversations allegedly had by Fleischer with other members of the conspiracy relating to Forbes.

Fleischer's testimony is even more suspect when one realizes the following (a) Forbes was never in New York or Brooklyn (b) nothing was ever brought to Forbes's place of business in North Bergen (c) No other member of the conspiracy testified against Forbes (d) the man who took the truck to New York, Gerald Barry, was not called to rebut Forbes' statement that he did not have any knowledge of Barry going to New York with the truck on March 3, 1972 pursuant to a truck job (e) Forbes completely clean record (f) Forbes high and good reputation in the community (g) Forbes' association with various police departments and having been designated an official impounding yard for the division of motor vehicles of New Jersey and (g) Fleischer's deals with the government to save his skin including the new identity which he failed to testify about.

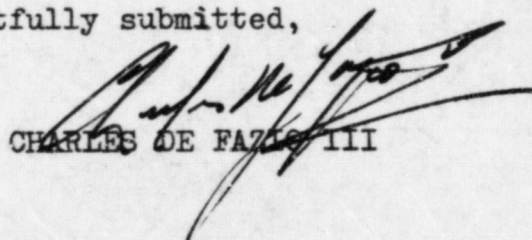
Declarations made by a member of a conspiracy cannot be used against other members unless there is other substantial evidence of the existence of the conspiracy; the order of proof is unimportant; the important consideration is establishing existence of the conspiracy by other substantial evidence. KLEIN V. U.S., C.A. Ariz. 1973, 472 F.2d 847.

CONCLUSION

It is based on the aforementioned legal arguments that the defendant requests that the guilty verdict be reversed and either (a) a verdict of not guilty be entered or (b) that the matter be remanded to the Eastern District of New York for a new trial. It is patently and overtly apparent that the errors, either looked at singularly or collectively, were of substantial prejudice and manifestly interfere with this defendant's right to a fair and equitable trial. The tactics and strategy used by the government to obtain a conviction in this case, it is respectfully submitted, went far beyond the bounds of proper evidentiary material and said tactics were even called to the U. S. Attorney's attention throughout the trial.

It is also and finally submitted that the mistrial should have been granted when requested during the testimony of one Lowett when the subject of the May 1972 was once again gone into by the Government.

Respectfully submitted,


CHARLES DE FAZIO III

75CR 275

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,		11-21-75	Holmes & Appleton	5	—
Clerk,		1-24-76	Parsons & Trench		
Marshal,		12-24-75	Notice of Appeal	5	—
Attorney,		12-24-75	Tr. & Tr. Co's		
Commissioner's Court,		3-14-76	Holmes & Appleton	5	
Witnesses,		3-20-76	Parsons & Trench		

DATE	PROCEEDINGS
4-8-75	Before Weinstein J - Indictment filed - Bench Warrants ordered for defts. MASTRANGELO, MASTANGELO & JOSEPH ADDOLORIA. Bench Warrants issued.
4-14-75	Petition for Writ of Habeas Corpus Ad Prosequendum filed(PETERS, COLLINS & PAUL FLAMMIO)
4-14-75	By Platt, J - Writs issued as above (ret. 4-25-75)
4-21-75	Before PLATT, J - case called - deft MASTRANGELO & counsel L.Eisenberg present - deft arraigned and after being advised of his rights enters a plea of not guilty - bail set at \$10,000-P.R.B. Bail limits extended to include, Manhattan and the Bronx - adjd to 4-25-75 for status report - any outstanding Bench Warrant is to be considered vacated.
4/25/75	By CATOGGIO, MAG.- Copy of Order for acceptance of cash bail filed

75CR 275

DATE	PROCEEDINGS
4/25/75	Before PLATT, J.- Case called- Defts and counsel present-Each deft arraigned and enters pleas of not guilty for defts. XXXXXXXXXXXXXXXXXXXXXXXXXXXX Bail set at \$50,000.00 surety bond for defts Peters, Collins, and Flammio- Bail set at \$25,000.00 P.R. Bond ^{or 10% cash} for deft Addoloria- Bail set at \$5000 P.R. Bond for deft Forbes and Barry, and Mastrangelo- Case adjd to 5/23/75 for status report
4-29-75	Writs ret'd and filed - executed as to defts COLLINS, PETERS & FLAMMIO.
5-6-75	By PLATT, J - Order filed appointing counsel for deft COLLINS.
5-12-75	Notice of Motion filed, ret. May 23, 1975, for Permission to obtain Grand Jury testimony, Inspection etc. (def't Charles Forbes)
5/15/75	Petitions for writs of habeas corpus ad prosequendum filed (COLLINS, FLAMMIO)
5/15/75	By PLATT, J.- Writs issued, ret. 5/22/75
5/23/75	Writ ret'd and filed. Executed. (G. COLLINS and P. FLAMMIO)
5/23/75	Before PLATT, J.- Case called- Defts and counsel present-Defts Peters and Flammio's motion to reduce bail- motion denied- case adjd to 5/30/75 to set trial date- deft Forbes's motion for discovery- motion denied on default
5/27/75	Notice of motion for discovery and inspection filed ret. 5/30/75 (BARRY)
5/28-75	Govts Notice of Readiness for Trial filed (all defts)
5/129/75	Notice of motion for inspection and bill of particulars filed ret. 5/30/75 (ADDOLORIA)
5/2-75	Notice of Motion filed for Bill of Particulars etc. (ret. May 30, 1975 (CHARLES PETERS)
5/30/75	Before PLATT, J.- Case called- Defts' motion for discovery etc. granted and denied as indicated on the record-Deft Barry's motion for severance- decision reserved- trial set down for 6/23/75 at 10:00 A.M.
6/17/75	Affidavits (2) of A.U.S.A. Levin-Epstein filed (BARRY and PETERS)
6/18/75	Petitions for writs of habeas corpus ad prosequendum filed (PETERS, FLAMMIO and COLLINS)
6/18/75	By PLATT, J.- Writs issued ret. 6/23/75
6/23-75	By PLATT, J - Memorandum and Order filed denying motion of deft PETERS (Bill of Particulars) and granting motion as indicated in the
6-23-75	By PLATT, J - Memorandum and Order filed (def't GERALD BARRY) denying motion for Discovery; motion for severance is also denied.
6-23-75	Before PLATT, J - case called - deft COLLINS & counsel John Corbett present - Govt motion to take exemplars - motion granted - adjd to June 24, 1975 - Certificate of Engagement issued to each counsel.
6/27/75	75 M 682 inserted in CR file.

75 CR 275
CRIMINAL DOCKET

DATE	PROCEEDINGS
6/24/75	Writs ret'd and filed- executed (PETERS, COLLINS and FLAMMIA)
6/24/75	Before PLATT, J.- Case called- Deft and counsel present- Court direct deft Collins to file handwriting exemplars- adj'd to 9/22/75 for trial
8-26-75	Notice of Motion filed, ret. 9-5-75, for permitting counsel to withdraw (deft Barry)
8-28-75	Proof of Service filed for above motion (original and 2 copies)
9/2/75	Petitions for writs of habeas corpus ad prosequendum filed (FLAMMIA, COLLINS and PETERS)
9/2/75	By PLATT, J.- Writs issued, ret. 9/22/75
9/18/75	By PLATT, J.- Order filed that Dr. A. Kaltman is appointed to examine defts Forbes and Barry, etc. Certified copies sent to the Marshall XXXXXX/XX/XXXX
9-22-75	Stenographers transcript dated June 23, 1975 filed (Collins)
9-22-75	Before PLATT, J - case called - defts & counsels present - defts FORBES & BARRY motion to sever - motion granted - deft Flammias motion to sever - motion denied- Govt motion to compel deft Collins to provide handwriting exemplars - motion granted - Govt motion to compel deft Peters to provide handwriting exemplars motion granted on consent - adj'd to 9-23-75 for trial.
9/23/75	Three(3) writs ret'd and filed- executed
9/23/75	Certified copy of order dated 9/18/75 ret'd and filed- executed
9-23-75	Before PLATT, J - case called - defts & attys present - counsel E. Mastropieri fined the sum of \$100 for contempt - execution of fine is stayed until completion of trial - defts FLAMMIA, COLLINS & CHARLES PETERS after being advised of their rights and each on his own behalf withdraws plea of not guilty and enter pleas of guilty to count 3 - sentences adj'd without date - defts COLLINS, PET & FLAMMIA continued in custody. Trial ordered and begun - jurors selected and sworn - trial cont'd to 9-24-75, as to defendants (defts MASTRANGELO & JOSEPH ADDOLORIA)
9-24-75	Before PLATT, J - case called - trial resumed - trial cont'd to 9-26-75.
9-25-75	Before PLATT, J - case called - trial resumed - trial cont'd to 9-29-75.
9/29/75	Before PLATT, J.- Case called Defts and counsel present- Trial resumed Trial cont'd to 9/30/75
9/30/75	Before PLATT, J.- Case called- Defts and counsel present- Trial resumed Trial cont'd to 10/1/75

DATE	PROCEEDINGS
10-1-75	Before PLATT, J - case called - trial resumed - Trial contd to Oct. 2, 1975.
10-2-75	Before PLATT, J.- Case called- Defts and counsel present-Trial resumed Defts motion for mistrial denied- Trial contd to 10/6/75
10-6-75	Before PLATT, J - case called - trial resumed - defts motion to dismiss - decision reserved as to count (3) denied as to the rest - trial contd to Oct. 7, 1975
10-7-75	Stenographer's transcript of 6/24/75 filed
10-7-75	8 Volumes of stenographers transcripts filed.
10-7-75	Before PLATT, J - case called - Trial resumed - Jury returns with a verdict of guilty on counts 1, 2 & 3 as to each deft - MASTRANGELO and ADDOLARIA - Jury polled and Jury discharged - bail contd - bail contd - sentences adjd without date.
10-7-75	By K Platt, J - Order of sustenance filed for Lunch-14 persons
10-24-75	Stenographers transcript of Oct. 7, 1975 filed. (pgs 1311 to 1383)
10-24-75	Petitions for writs of habeas corpus ad prosequendum filed- writs' issued (FLAMMIA, COLLINS and PETERS)
11-2-75	Before PLATT, J - case called - deft MASTRANGELO & counsel E.Mastropieri present - deft sentence to imprisonment on count 1 for a period of 7 years; on count 2 for a period of 5 years - to run concurrently with count one - Deft to serve 7 years imprisonment on count 3 - execution of sentence to be suspended and the deft is placed on 5 years probation - count 3 to run consecutively with counts 1 and 2 - bail set at \$25,000 pending appeal. Deft FLAMMIA & counsel G. Sheinberg present - deft is sentenced on count 3 to 6 years imprisonment under 18:4208(a)(2) - sentence to run consecutively to State sentence ; On motion of AUSA Levin-Epstein counts 1 and 2 are dismissed. Deft Peters & counsel T.O'Brien present - deft sentenced to imprisonment for 8 years pursuant to 18:4208(a)(2) - sentence to run consecutively to any State sentence. On motion of AUSA Levin-Epstein counts 1 and 2 are dismissed. Deft COLLINS & counsel John Corbett present - Deft is sentenced on count 3 to imprisonment for a term of 8 years pursuant to 18:4208(a)(2) - sentence to run consecutively with State sentence. On motion of AUSA Levin - Epstein counts 1 and 2 are dismissed.
11-2-75	Judgment & Commitments filed for defts. COLLINS, PETERS, FLAMMIA, MASTRANGELO & ADDOLARIA - certified copies to US Marshal & Probation.
11-2-75	Voucher for compensation of counsel filed (deft Peters)
11-5-75	Writs ret'd and filed - executed (PETERS, FLAMMIA & COLLINS)

CRIMINAL DOCKET

DATE	PROCEEDINGS
11-21-75	Before PLATT, J - case called - deft ADDOLORIA & atty Harold Goerlich present - Deft is sentenced for 9 years pursuant to 18:4208(a)(2) on count 1; for a term of imprisonment of 5 yrs on count 2 to run concurrently with the sentence in count 1 pursuant to 18:4208(a)(2); for a term of imprisonment on count 3 for a period of 9 years. Execution of sentence is suspended and deft is placed on probation for 5 years; count 3 to run consecutive with the sentences in counts 1 and 2 - bail set at \$25,000 secured bond pending appeal.
11-21-75	Judgment & Commitment filed - certified copies to Marshal (ADDOLORIA)
11-21-75	Notice of Appeal filed (MASTRANGELO)
11-21-75	Docket entries and duplicate of Notice mailed to Court of Appeals (MASTRANGELO)
11-25-75	Voucher for compensation of counsel filed (COLLINS)
12-1-75	Record on Appeal certified and mailed to the Court of Appeals. (MASTRANGELO)
12-1-75	By PLATT, J - Order filed releasing bail (ADDOLORIA)
12-3-75	Notice of Appeal filed (ADDOLORIA)
12-3-75	Docket entries and duplicate of Notice of Appeal mailed to the Court of Appeals. (Addoloria)
12/5/75	Acknowledgment mailed received from court of appeals for receipt of (Mastrangelo)
12-8-75	Supplemental Index to Record on Appeal certified and mailed to the Court of Appeals (ADDOLORIA)
12-10-75	Order received from the Court of Appeals that the Record on Appeal be docketed on or before Dec. 15, 1975.
12-18-75	Acknowledgment received from the Court of Appeals for receipt of supplemental index to record on appeal (Addoloria)
12/30/75	Voucher for Compensation filed (for deft P. Flaminio)
1/2/76	Stenographer's transcript of 11/21/75 filed (R. Mastrangelo)
1/2/76	Stenographer's Transcript of 11/21/75 filed (J. Addoloria)
1/2/76	Supplemental Index to Record on Appeal certified and mailed to the Court of Appeals (ADDOLORIA & MASTRANGELO)
1/5/76	Before PLATT, J.- Case called- defts Barry and Forbes present- order signed requiring deft Forbes to take a medical examination- case set to 1/23/76 at 10:00 A.M. for status report

DATE	PROCEEDINGS
1-6-76	By PLATT, J - Order filed that the deft (Charles Forbes) present himself for examination on 1-9-76 at the offices of Dr. Myron Texon , 3 E. 68th St. New York, N.Y. and that Dr. Texon be permitted to examine any and all charts and/or medical records or documents , including but not limited to any records prepared or maintained by Dr. Henry Twerdow, North Bergen, N.J. and that upon completion of his examination to report to this court in writing , his ^{medical} medical opinion as to the defts ability to stand trial, etc. It is further ordered that copies of Dr. Texon's report be forwarded to Asst U.S. Atty Levin-Epstein and Charles DeFazio, III, Esq. 922 Washington Street, Hoboken, N.J.
1-8-76	Stenographers transcript filed dated Nov. 21, 1975
1-14-76	Motion for modification and/or reduction of sentence imposed as to deft Collins.
1-16-76	Acknowledgment received from the Court of Appeals for receipt of supplemental index to record on appeal and filed. (ADDOLORIO & MACSTRANGELO)
1-22-76	By PLATT, J. - Memorandum and Order dtd 1-21-76 denying plttf's motion for reduction of sentence filed (copy mailed to deft as directed).
1/23/76	SUPERSEDING INFORMATION AND WAIVER OF INDICTMENT FILED (CERLAD BARRY)
1/23/76	Before PLATT, J. - Case called - deft and counsel - deft BARRY arraigned and after being being advised of his rights by the court and on his own behalf withdraws his plea of not guilty and enters a plea of guilty to the superseding information - bail contd - sentence adjd without date -
1/29/76	Before MISHLER, CH. J. - Case called - deft FORBES and counsel Charles De Fazio present - Trial ordered and begun - jurors selected and sworn - trial contd to 1/30/76 at 10:00 A.M.
1-30-76	Before MISHLER, CH J - case called - deft FORBES & counsel Charles De Fazio present - trial resumed - Govt rests - motion by deft for a Mistrial is denied - motion by the deft for Judgment of acquittal is denied - Trial contd to 2-2-76.
2-2-76	Before MISHLER, CH. J. - Case called. Deft Charles Forbes and counsel Charles DeFazio present. Nine jurors present, five jurors not present due to the snow storm. Trial continued to 2-3-76 at 10 A.M.
2-3-76	Before MISHLER, CH J - case called - deft Forbes & counsel present - trial resumed - at 12:30 PM the Jury retired for deliberation - at 3:00 PM the Jury returned and rendered a verdict of guilty on count 2 as to deft Forbes - Jury polled - Jury discharged - trial concluded - motion by deft to set aside the verdict is denied - bail conditions contd \$5,000 PM -

75 CR--275
CRIMINAL DOCKET

DATE	DESCRIPTION
	Bail limits extended to the State of New Jersey - sentence adjd without date.
2-3-75	By Mishler, Ch J - Order of sustenance filed.
2/9/76	Notice of motion to reduce sentence filed(PETERS)
2/25/76	Notice of motion to reduce sentence filed(FLAMMIA)
2/26/76	By PLATT, J.- Memorandum and Order filed denying motion for reduction of sentence(PETERS)
3-3-76	Mandate received from the Court of Appeals affirming the Judgment of this court (JN)
3/4/76	Records ret'd from court of appeals- acknowledgment mailed for receipt of file
3/18/76	Notices of motions to file late appeals filed (Peters and Collins)
3-1'	Before MISHLER, CH J -case called - deft Barry & counsel Richard Weiner present - Imposition of sentence is suspended and the deft is placed on probation for 2 years, sentenced on 75 CR-275 (S). On motion of AUSA Levin Epstein the indictment is dismissed. Deft FORBES & counsel Charles De Fazio III present - deft is sentenced to a term of imprisonment on count 2 for 3 years and a fine of \$2,500. Execution of sentence is suspended and the deft is placed on probation for 2 years. Clerk to file Notice of Appeal on behalf of deft Forbes - bail conditions contd pending appeal. Payment of fine stayed pending appeal'
3-19-76	Judgment and Order of probation filed for defts FORBES & BARRY. Certified copies to Probation.
3-19-76	Notice of Appeal filed (Forbes)
3-19-76	Docket entries and duplicate of Notice of Appeal mailed to the Court of Appeals.
3-22-76	By PLATT, J - Memorandum and Order filed denying motion of deft Paul Flammia for reduction of sentence -Copy forwarded to the deft.
3-24-76	Stenographers transcript filed dated Sept. 23, 1975 (Flammia)
3/25/76	Letter from deft Flammia reflecting change of address filed
3-25-76	Voucher for compensation of expert services filed (Flammia)
4-2-76	Stenographers transcript filed dated 9-23-75
4-2-76	Stenographers transcript filed dated Nov. 21, 1975 (Collins)
4-2-76	Stenographers transcript filed dated Nov. 21, 1975 (Flammia)

DATE

PROCEEDINGS

4-15-76	Order received from the C of A that the record on appeal be docketed on or before April 30, 1976
4-28-76	Judgment & Commitments ret'd and filed as to defts Addoloria and Mastrangelo - defts. delivered to Warden, MCC. NY
5/13/76	Stenographers Transcripts dated 1/29/76, 1/30/76, 2/3/76(2) and 3/19/76 filed
5-26-76	Stenographers transcript filed dated 9-23-75

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket Number 75 Cr 275

U.S.

Jacob Mischler, J.B.C.

(District Court Judge)

CHARLES FORBES,

Defendant

NOTICE OF APPEAL

Notice is hereby given that CHARLES FORBES appeals to
the United States Court of Appeals for the Second Circuit from the ☐ Judgment ☐ order ☐ other
(specify) Jury verdict of Guilty entered in this action on February 3, 1976
(Date)

Charles De Fazio III

(Counsel for Appellant)

Date March 12, 1976

Address

922 Washington St.
Roboken, N.J. 07030

To: Office of the Clerk
U.S. 2nd Circ. Court of Appeals
Federal Bldg., Brooklyn, N.Y. 11201

Phone Number 201-659-5760

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION - FORM B

► **QUESTIONNAIRE**

- ☒ I am ordering a transcript
☐ I am not ordering a transcript
Reason:
☐ Daily copy is available
☐ U.S. Attorney has placed order
☐ Other. Attach explanation

► **TRANSCRIPT ORDER**

- Prepare transcript of
☐ Pre-trial proceedings
☒ Trial
☐ Sentence
☐ Post-trial proceedings

DESCRIPTION OF PROCEEDINGS
FOR WHICH TRANSCRIPT IS
REQUIRED (INCLUDE DATE)

Trial
Jan. 30, Feb. 2 & 3, 1976
(including opening and closing statements)

The ATTORNEY certifies that he will make satisfactory arrangements with the court report for payment of the cost of the transcript. (FRAP 10(b)) ► Method of payment ☒ Funds ☐ CJA Form 21

ATTORNEY'S signature

DATE March 12, 1976

► **COURT REPORTER ACKNOWLEDGEMENT**

To be completed by Court Reporter and forwarded to Court of Appeals.

Date order received

Estimated completion date

Estimated number of pages.

Date

Signature

(Court Reporter)

COPY FOR DEFENDANT

BEST COPY AVAILABLE

RJD:EL-E:1j1
F. #751,403

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

- against -

CHARLES PETERS,
GERARD COLLINS, a/k/a "Rebel",
PAUL FLAMMIO,
ROCCO MASTRANGELO, a/k/a "Rocky",
JOSEPH ADDOLORIA, a/k/a "Joe Baldy",
CHARLES FORBES and
GERALD BARRY,

Defendants.

----- X

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 3rd day of March 1972, within the Eastern District of New York, the defendants CHARLES PETERS, GERARD COLLINS, also known as "Rebel", PAUL FLAMMIO, ROCCO MASTRANGELO, also known as "Rocky" and JOSEPH ADDOLORIA, also known as "Joe Baldy", with intent to convert to their own use, did wilfully and knowingly embezzle, steal and unlawfully take from a motortruck belonging to the Arline Knitwear Company, Brooklyn, New York, a quantity of women's knitted garments, having a value in excess of One Hundred Dollars (\$100.00), which goods were moving as and constituting an interstate shipment of freight from New York to New Jersey. (Title 18, United States Code, Section 659 and 2)

Cr. No. 75CR275
(T. 18, U.S.C., §659, §371,
§924(c) (1), (2) and §2)

4-8-75

COUNT TWO

On or about and between the 1st day of January 1972 and the 7th day of March 1972, both dates being approximate and inclusive, within the Eastern District of New York, the defendants CHARLES PETERS, GERARD COLLINS, also known as "Rebel",

PAUL FLAMMIO, ROCCO MASTRANGELO, also known as "Rocky", JOSEPH ADDOLOPIA, also known as "Joe Baldy", CHARLES FORBES and GERARD BARRY, along with Paul Fleischer, named herein as a co-conspirator but not as a co-defendant, and others known and unknown to the Grand Jury, did knowingly and wilfully conspire to commit offenses against the United States, in violation of Title 18, United States Code, Section 659, by conspiring to unlawfully take from a motortruck belonging to the Arline Knitwear Company, Brooklyn, New York, a quantity of women knitted garments, having a value in excess of One Hundred Dollars (\$100.00), which goods were moving as and constituting an interstate shipment of freight from New York to New Jersey, and further, to unlawfully receive and have in their possession the said garments, the aforesaid defendants knowing the same to have been stolen.

In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, within the Eastern District of New York and elsewhere, the defendants CHARLES PETERS, GERARD COLLINS, also known as "Rebel", PAUL FLAMMIO, ROCCO MASTRANGELO, also known as "Rocky", JOSEPH ADDOLORIA, also known as "Joe Baldy", CHARLES FORBES and GERALD BARRY committed among others the following:

O V E R T A C T S

1. In or about January 1972, within the Eastern District of New York, the defendants CHARLES PETERS, GERARD COLLINS, also known as "Rebel", PAUL FLAMMIO, ROCCO MASTRANGELO, also known as "Rocky" and JOSEPH ADDOLORIA, also known as "Joe Baldy", along with co-conspirator Paul Fleischer met in Queens, New York.

2. On or about March 3, 1972, the defendant CHARLES FORBES had a telephone conversation with the defendant ROCCO MASTRANGELO, also known as "Rocky", in New York, New York.

3. On or about March 3, 1972, the defendant GERALD BARRY drove a tow truck from New Jersey to New York, New York. (Title 18, United States Code, Section 371).

COUNT THREE

On or about the 3rd day of March 1972, within the Eastern District of New York, the defendants CHARLES PETERS, GERARD COLLINS, also known as "Rebel", PAUL FLAMMIO, ROCCO MASTRANGELO, also known as "Rocky" and JOSEPH ADDOLORIA, also known as "Joe Baldy", knowingly, intentionally, wilfully and unlawfully carried and used a firearm, during their commission of an offense for which they may be, and are being, prosecuted in a Court of the United States, to wit: the theft of a quantity of women's knitted garments, having a value in excess of One Hundred Dollars (\$100.00), which goods were moving as and constituting an interstate shipment of freight, in violation of Title 18, United States Code, Section 659, which offense is set forth in Count One above. (Title 18, United States Code, Sections 924(c)(1), (2) and Title 18, United States Code, Section 2)

A TRUE BILL.

FOREMAN

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

No. _____

UNITED STATES DISTRICT COURT

EASTERN District of NEW YORK

Division

THE UNITED STATES OF AMERICA

vs.

CHARLES PETERS, et. al.,

Defendants.

INDICTMENT

(T. 18, U.S.C., §659, §371,
§924(c)(1), (2) and §2)

A true bill,

Foreman.

*Filed in open court this _____ day
of _____, A. D. 19____*

Clerk.

Ball, §

E. LEVIL-EPSTEIN, ADEN

GP 9 902-482

596-3687

Court's Charge

480

1
2 MR. LEVIN-EPSTEIN: There has been one trial
3 of this actual indictment, in which the defendants
4 Mastrangelo and Adelorio had been convicted. 75 CR 280,
5 in which Mr. Braverman and Mr. Santoro were convicted.
6 This is the third trial in the series of three indict-
7 ments. The reason that Mr. Forbes is present, is be-
8 cause he was severed earlier at counsel's motion, be-
9 cause of a physical infirmity. I don't know which
10 District Court file you have there, Your Honor, but
11 if you are missing it, I will be happy to give it to
12 you. I think I supplied that to you on the first day,
13 Your Honor.

14 THE COURT: I think I am ready, if they
15 are ready. See if the jury is ready.

16 (Whereupon the jury entered the courtroom)

17 THE COURT: Mr. Foreman, ladies and gentle-
18 men of the jury, a jury trial really consists of three
19 major areas of participation. We have the lawyers,
20 whose duty it is to develop the evidence. The jury
21 trial is called an adversary proceeding. The parties
22 are adversaries and they are adversaries on a particular
23 issue or issues of fact. In this particular case, the
24 issue that will most certainly engage your attention,
25 and is vital to the case is whether or not the accused,

1
2 Charles Forbes, sat down with Peters and Fleischer prior
3 to March 3rd, 1972, and spoke about using Forbes' place
4 of business as a drop for hi-jacked merchandise that
5 was moving in interstate commerce, and subsidiary issue
6 as to whether Forbes' tow truck came over to New York
7 on March the 3rd to tow the truck from Airfreight Haul-
8 age, approximately seven or eight blocks to a location
9 near West Street, and whether Forbes knew his tow truck
10 was being used in that fashion.

11 All the other evidence relates to the plans and
12 means employed to hi-jack the Arlene Trucking or Arlene
13 Manufacturing truck with the goods on March 3rd; all
14 incidentally necessary to prove the government's case,
15 and if not necessary, certain material to prove the
16 government's case. The point to make here in outlining
17 the various duties that each participant in the trial
18 has, is to understand that it is the lawyers obligation
19 to develop the evidence, and the lawyers, of course,
20 are partisan, they are protagonists, they represent
21 clients, and you expect that their role is far differ-
22 ent than that of the judge and the jury. The judge and
23 the jury are objective, dispassionate, we must both
24 look at the case as judges, but each from a different
25 point of view. You look at the facts. You look at it

1
2 objectively and dispassionately, and from all the evi-
3 dence in the case you determine what happened. You de-
4 termine the sharp issue of fact as to whether when Peters
5 and Fleischer visited Mr. Forbes at his place of business
6 at Tonnele Avenue or whatever the avenue is in New Jersey
7 where they just casually walked in and had a cup of
8 coffee and spoke about nothing in particular or whether
9 they sat down and talked about the possibility of using
10 the place as a drop or they talked price, and what Mr.
11 Forbes would get out of it.

12 The Court on the other hand is the sole judge
13 of the law, just as you solely decide the facts. The
14 Court decides the law of the case. So, during the trial,
15 I was obliged to make rulings on objections, and during
16 the summations I was obliged to make rulings on object-
17 ion to the summations made by both sides, and now I
18 charge you on the law.

19 Now, I am obliged to accept your findings of
20 facts, because you are the judges of the facts. You,
21 on the other hand, are obliged to accept my charge on
22 the law, because I am the sole authority on the law. It
23 would be a violation of your duty to just disregard the
24 law as I charge it, and decide to go on your merry way
25 and apply any law you thought seemed logical to you,

1
2 just as I would be violating my duty if I, in any way,
3 interfered with your fact finding. I have no right to
4 do it, and I say to you right now, I have no idea one
5 way or the other, no opinion as to the guilt or innocence
6 of the defendant. That is solely with you.

7 The first principle that we consider is a pre-
8 sumption of innocence. Every defendant in every crim-
9 inal trial is presumed to be innocent. That means that
10 at the very outset of the trial you must conclude that
11 the defendant is innocent of the charge in the indict-
12 ment, and that conclusion persists throughout the trial
13 and throughout your deliberations, and is sufficient to
14 acquit a defendant unless the government overcomes that
15 presumption by proof of the defendant's guilt of the
16 charge beyond a reasonable doubt. So that if the govern-
17 ment fails in its burden, you have the obligation of
18 finding the defendant not guilty. You can't speculate
19 whether he is or not. You look at the evidence. If
20 the evidence doesn't convince you, then you have the
21 obligation of finding him not guilty.

22 I would like to use the manner of verdict in
23 Scotland. It is called the Scotch Verdict. You probably
24 heard the term. In Scotland there are three verdicts.
25 It is guilty, not guilty or not proven. In this country,

1
2 of course, we have only two. It is either guilty or
3 not guilty, and not guilty includes not proven.

4 Now, what is a reasonable doubt? A reasonable
5 doubt is a kind of doubt that a reasonable person would
6 have after viewing all the evidence. It is a doubt
7 based on reason and common sense, and the evidence in
8 the case, the state of the record. It is not something
9 vague, speculative or imaginary doubt. It is not the
10 kind of doubt that you might have if after finding the
11 government proved the guilt of the defendant beyond a
12 reasonable doubt, you were disinclined to convict
13 because you don't like to perform an unpleasant task.
14 A reasonable doubt is the kind of doubt that a reasonable
15 person would have, and hesitate to act in a matter of
16 performance to himself or herself. Proof beyond a
17 reasonable doubt is therefore proof of such convincing
18 character that you would be willing to rely and act
19 upon unhesitatingly in the most important of your own
20 affairs. The government does not have the burden of
21 proving the guilt of the defendant beyond all possible
22 doubt. The government does not have the burden of
23 proving that every bit of evidence that was submitted
24 is true beyond a reasonable doubt. The government does
25 not have the burden of proving beyond a reasonable doubt

Court's Charge

485

1
2 all the essential elements of the crime charged in this
3 indictment, and I will list the essential elements of
4 the crime charged, and the government will have to prove
5 all of those elements beyond a reasonable doubt.

6 The defendant has no obligation of offering any
7 proof. In this case the defendant took the stand,
8 testified, brought in witnesses. But the defendant has
9 the right to rely on the failure of the government to
10 prove his guilt beyond a reasonable doubt. The defendant
11 offered three witnesses, Detective Vincent DeCarlo,
12 Joseph Lutagraff, and Gerald Schwartz, and they gave
13 testimony as to the defendant's reputation for his
14 integrity, truthfulness and industry in the community,
15 and expressed their own opinions as to those traits of
16 character.

17 Now, evidence of the defendant's reputation and
18 the personal opinion expressed by the witness incon-
19 sistent with those traits of character ordinarily
20 associated with the crime charged may give rise to
21 reasonable doubt, since the jury may think it improbable
22 that a person of such good character and respect to
23 those traits would commit such a crime.

24 Now, evidence of good character should be charged
25 with all the other evidence in the case in determining

1
2 whether the government has proved its case beyond a
3 reasonable doubt. Of course, if after considering all
4 the evidence, including the character evidence that the
5 government has proved its case beyond a reasonable doubt,
6 then you should not refuse to convict merely because the
7 defendant is shown to be a man of good character.

8 Evidence is the method that the law uses to
9 prove or disprove a disputed fact. Evidence is generally
10 classified as either direct evidence or indirect, some-
11 times called circumstantial evidence. Direct evidence
12 is the testimony of witnesses of what those witnesses
13 saw or heard. Circumstantial evidence is a method of
14 proving or disproving a disputed fact by a jury drawing
15 lone inferences based upon their good common sense and
16 experience. I have come to use routinely and example
17 of what I mean. My courtroom deputy and myself were
18 on the corner of A and 1st Street, let's say just to
19 use a hypothetical, and a stop sign is on the street.
20 Let's assume he had his back on the roadway and stop
21 sign, and I was facing the roadway and stop sign. Let's
22 assume I saw this 1976 Cadillac come down the roadway,
23 pass the stop sign and strike someone. Let's say it
24 was a woman so we can identify the plaintiff and the
25 defendant. In the hypothetical, let's assume that A,

1
2 Mrs. A, sued Mr. B claiming that B was driving his car
3 on the particular day and failed to stop at the stop
4 sign, and proceeded beyond it and struck her and knocked
5 her down. Now, first sitting here as a jury in that
6 personal injury case, we would have the contested issue
7 the plaintiff said the defendant passed the stop sign
8 without stopping. The defendant said, "yes, I stopped
9 and then proceeded." First called to the stand, since
10 the stop sign was in view, I would give direct testimony
11 of that issue. You see, you must first identify the
12 issue. I would, in effect, say, I was talking with Mr.
13 Adler, and as I was speaking with him, stop sign in
14 view, the defendant's motor vehicle came within my
15 peripheral vision. I noticed it was approximately 65
16 miles an hour, passed the stop sign and struck Mrs. A.
17 That is direct testimony of that contested issue. On
18 the other hand, Mr. Adler is not incompetent to testify
19 because he did not see that the motor vehicle passed
20 the stop sign. He could testify to the circumstances
21 surrounding that issue. He might testify he was speak-
22 ing with me, he turned to his left or his right, rather,
23 saw the motor vehicle coming down the highway traveling
24 about 65 miles an hour, he lost sight of it as it passed
25 behind him about two or three seconds of travel, about

1
2 150 feet, he turned to the left and he saw the motor
3 vehicle again traveling about the same rate of speed,
4 and saw it knock down Mrs. A. Now, there the circum-
5 stances, the car traveling about 65 miles an-hour,
6 traversing about 100 or 150 feet, your good common
7 sense and experience will tell you that he could not
8 have stopped and then proceeded in that time. So from
9 all these circumstances, I think it is fair to say that
10 you come to the same conclusion on that fact as you
11 would have by the direct testimony. The law doesn't
12 hold that direct testimony is a better quality than
13 circumstantial evidence. Sometimes circumstantial
14 evidence is of better quality. Sometimes direct
15 evidence is of better quality. The law requires only
16 that the government prove the guilt of the defendant
17 on both the direct and circumstantial evidence by proof
18 beyond a reasonable doubt.

19 What is the evidence in this case? One, it is
20 the sworn testimony of the witnesses regardless of who
21 called them. All their testimony, the direct, cross,
22 the exhibits that are actually marked in evidence, the
23 facts that the Court judicially noticed; for example,
24 I think I judicially noticed that the 3rd day of March,
25 1972 was a Friday. I am not sure I judicially noticed

Court's Charge

489

1
2 it, but if I didn't I better judicially notice it corr-
3 ectly. It is just facts that are established beyond
4 question, recorded, that I can judicially notice. I
5 have a calendar, and I was correct, March 3rd, 1972, was
6 a Friday. And upon all that, and the inferences that
7 may fairly be drawn, you will arrive at your determin-
8 ation as to what happened. And then, in accordance with
9 the law as I charge it, you will determine the guilt or
10 innocence of this defendant. I think it is important
11 for you to understand what is not evidence in the case.
12 The statements that counsel make in opening and in
13 summation. They are designed as aids in your search
14 for the truth. The opening statements are designed to
15 alert you as to what the parties claim what there pos-
16 itions are, so that you may more easily follow the
17 testimony that is to come, and in summation, the argument
18 made by counsel, the defendant arguing that the govern-
19 ment has failed to prove guilt beyond a reasonable doubt;
20 arguments for exculpability, and the government argument
21 of inculpability. The government's argument that the
22 government proved the guilt of the defendant beyond a
23 reasonable doubt. Begin to focus on the important
24 testimony given or what the lawyers regard as important,
25 and arguments made, I am asking you to draw the infer-

1
2 ences from it. You couldn't possibly accept all the
3 arguments of both counsel, but they are offered to you
4 because some may sound attractive to you. Those that
5 aren't, you just reject. Those that are considered,
6 that would lead you to a just result, you keep. Evidence
7 stricken from the record may not be considered by you.
8 As I directed the court reporter to physically strike
9 it from his record, so you are to strike it from your
10 consideration, from your recollection. At times object-
11 ion was made to questions where the Court sustained the
12 objection. You may not speculate on what the answer
13 might have been if the witness were allowed to answer
14 on the same theory that it is not in the record. If it
15 is not in the record, you may not consider it.

16 I have used the term inference and presumption,
17 and I think I should define them. An inference is a
18 conclusion which reason and common sense leads the jury
19 to draw the facts which have been established by the
20 evidence, and the example of that, of course, is the
21 inference that a jury draws in determining a disputed
22 fact through circumstantial evidence. An inference is
23 a discretionary matter with the jury, based on common
24 sense. A presumption, on the other hand, is the in-
25 clusion which the law requires the jury to make and

1
2 continue only so long as it is not overcome or outweighed
3 by the evidence in the case to the contrary. But, un-
4 less and until the presumption is so outweighed, the
5 jury is bound to find in accordance with the presumption,
6 and the example of that, of course, is the presumption
7 of innocence.

8 Now, the jurors are the sole judges of the
9 credibility of the witnesses, which means the believ-
10 ability of the testimony and the weight their testimony
11 deserves. Scrutinize the testimony given and the
12 circumstances under which each witness testified, and
13 every matter in evidence which tends to show whether
14 a witness is worthy of belief. Take into consideration,
15 one, the witness's intelligence.

16 Two, the witness's motive and the state of mind.
17 In other words, why is the witness testifying? What is
18 his state of mind as he testifies before you. The
19 witness's demeanor on the stand. The manner in which
20 the witness answers the question. Is the witness with-
21 holding information? Is the witness answering fully
22 and fairly. Take into consideration the witness's own
23 ability to observe the matters as to which he has test-
24 ified. Whether he has impressed you as one who had an
25 accurate recollection of those matters. Take into con-

1
2 sideration the relation each witness made to each side
3 of the case. Take into consideration the manner in which
4 each witness might be affected by the verdict. Take
5 into consideration the extent, if any, to which the
6 witness's testimony is corroborated. If a witness has
7 been shown to have knowingly and intentionally testified
8 falsely concerning a material fact, you may, if you
9 wish, disregard all that witness's testimony on the
10 theory that the witness is unworthy of belief. On the
11 other hand, you may, if you wish, accept so much of that
12 witness's testimony as you find credible. The principles
13 merely underscores the wide discretion the jury has in
14 weighing the credibility of a witness's testimony. A
15 defendant who wishes to testify is as competent as a
16 witness. You may judge his testimony the same as any
17 other witness. His intelligence, his motive, state of
18 mind, his demeanor on the witness stand, the many ways
19 in which he will be affected by the verdict, the extent
20 to which his testimony is corroborated or contradicted
21 by the other evidence in the case.

22 The government offered proof that upon being
23 informed that a crime was committed, the defendant
24 failed to identify the photograph of Paul Fleischer when
25 it was exhibited to him by a special agent of the FBI.

1
2 You are called upon to determine whether such failure
3 was inadvertently a result of confusion. You must re-
4 member the photograph was a black and white photograph,
5 and Fleischer had red hair. Carelessness or other
6 innocent reason. If such is the case, then the evidence
7 is of no probative value. However, if the accused was
8 aware that the photograph was one of Fleischer, and he
9 knowingly and intentionally failed or refused to identify
10 the picture as the picture of Fleischer, and you find
11 that the defendant failed to identify the picture in
12 order to establish his innocence, then you may consider
13 such failure in the light of all the evidence in the
14 case in determining guilt or innocence. Where a defend-
15 ant knowingly and intentionally makes a false statement
16 in order to establish his innocence, the jury may con-
17 sider whether this circumstantial evidence points to
18 a consciousness of guilt.

19 Ordinarily, it is reasonable to infer that an
20 innocent person does not usually find it necessary to
21 make a false statement to establish his innocence.
22 Whether or not evidence is to the defendant's voluntary
23 statement in failing to make an identification points
24 to a consciousness of guilt, and any significance to be
25 attached to any such evidence are matters exclusively

1
2 within the province of the jury. Paul Fleischer test-
3 ified that he participated in the crime charged. You have
4 the right to suspect the testimony of the participant
5 in the crime charged if you find that he has a personal
6 stake in the outcome of the trial or if you find that
7 he believes that the rewards promised depends on the
8 outcome of the trial. Paul Fleischer is not incompetent
9 to testify because of his participation in the crime
10 charged. On the contrary, the testimony of such a
11 participant alone, if believed by the jury to be true
12 beyond a reasonable doubt, may be of sufficient weight
13 to sustain a verdict of guilty, even though not cor-
14 roborated or supported by other evidence in the case.
15 The jury should keep in mind that the testimony of an
16 accomplice is always to be received with caution and
17 weighed with great care. You should never convict a
18 defendant of an unsupported testimony of an alleged
19 accomplice, unless you believe such testimony to be
20 true beyond a reasonable doubt. Paul Fleischer testi-
21 fied that he was convicted of a felony. As a matter
22 of fact, convicted of participation in the crime charged
23 here. The testimony of a witness may be disconsidered
24 or impeached by showing that the witness has been con-
25 victed by a felony, that is a crime punishable in prison.

1
2 It does not render a way you may consider in determining
3 the credibility of the witness. It is the province of
4 the jury to determine the weight of any given testimony
5 as impeachable.

6 Now, turning to the charge in this indictment,
7 I could first read you U.S. 18 U.S.C. Section 659. You
8 must understand that what is a crime depends on Congress-
9 ional enactment. It is the Congress that makes that
10 determination. Most of our criminal statute is found
11 in Title 18. It is entitled CRIMES OF CRIMINAL PROCEDURE.
12 In pertinent part, it makes a Federal crime for anyone
13 who steals or unlawfully takes, carries away or conceals
14 from any motor truck or other vehicle with intent to
15 convert to his own use, any goods moving or which are
16 a part of or which constitute an interstate shipment of
17 freight. That is what we call the substantive crime.
18 It is a crime for anyone to steal, take away from a
19 motor truck, to hi-jack goods from a motor truck, and
20 makes it a federal crime if the goods are moving or a
21 part of interstate shipment.

22 This defendant is not being charged with the
23 substantive crime. The statute, 18 U.S.C. Section 371,
24 makes it a crime to enter into any agreement, deal or
25 venture, business partnership, to steal from a motor

1
2 truck that is carrying goods moving in interstate comm-
3 erce. It says that in this general language: "If two
4 or more persons conspire either to commit any offense
5 against the United States of for any purpose, and one or
6 more of such persons do any act to effect the object to
7 the conspiracy, the crime is committed." It is not
8 necessary for the government to prove that the purpose
9 of the conspiracy was accomplished. It is necessary
10 for the government to prove that the parties, two or
11 more, entered into an understanding, and that thereafter,
12 at least one of the parties did something in an effort
13 to accomplish the purpose of the understanding or the
14 business. A conspiracy is a combination of two or more
15 persons who by concerted action, enter into an under-
16 standing to accomplish an unlawful purpose. Conspiracy
17 has been described as a partnership in criminal purposes
18 in which each member becomes the agent of every other
19 member. The gist of the offense is the understanding
20 to commit the unlawful act. Merely similarity of conduct
21 among the various persons, the fact that persons met,
22 associated does not necessarily establish proof of the
23 existence of a conspiracy. However, the evidence in the
24 case need not show that the members enter into any for-
25 mal or expressed agreement. It need not show that they

1
2 all sat down and discussed the terms of the unlawful
3 venture. What the proof must show, is that the members
4 in some way, in some manner or contrivance, positively
5 or tacitly came to a mutual understanding to try to
6 accomplish the unlawful plan. Evidence need not show
7 that all the members of the conspiracy knew each other.
8 What the evidence in the case must establish beyond a
9 reasonable doubt is that the alleged conspiracy was
10 knowingly formed, and that one or more of the methods
11 or means alleged were used in an effort to accomplish
12 the purpose of the conspiracy. A person may become a
13 member of the conspiracy even though he wasn't present
14 at the very outset. It is necessary for the government
15 to prove that the accused was present when the entire
16 plan was conceived. One who enters into a conspiracy
17 after the conspiracy is established is responsible for
18 all that happened before.

19 Before you may find that the accused became a
20 member of the conspiracy, the evidence must show beyond
21 a reasonable doubt that the defendant was aware of the
22 purpose of the conspiracy. In this case, that he was
23 aware that this was an understanding, a plan to steal
24 or hi-jack a truck. It is necessary for the government
25 to prove that the defendant was aware of the specific

1
2 truck that was to be hi-jacked or any of the other
3 details as to when it was going to be hi-jacked. In
4 this case, the government must prove beyond a reasonable
5 doubt that this accused knew that Peters and Fleischer
6 and others were planning to hi-jack a truck, and under-
7 stood that his role was to be that of providing the
8 drop for the stolen goods.

9 During the trial, I gave a limiting charge, as
10 I recall, on how to treat testimony of conversations
11 between the witness and third parties, outside the
12 presence of the defendant. Of course, testimony as
13 to conversations with a defendant, if you credit it,
14 is chargeable against a defendant. You may counter
15 in determining whether he entered into the conspiracy,
16 but in our system of jurisprudence, an individual is
17 only responsible for what the individual says or does,
18 not what someone else says or does. The exception to
19 that principle is a case such as this, where one member
20 of the conspiracy may act as an agent of the other
21 member of the conspiracy. It is similar to a lawful
22 partnership, where one partner may speak for another
23 partner during the term of the partnership.

24 So here, if you are satisfied that the government
25 proved beyond a reasonable doubt that a conspiracy

1
2 existed, and that Paul Fleischer was a member of that
3 conspiracy, and that he knowingly and wilfully entered
4 into that conspiracy, and that means that the party is
5 aware of what he is doing, it is not through mistake or
6 ignorance, and wilfully means that he voluntarily and
7 intentionally entered into it knowing that it is unlaw-
8 ful; if you believe the government proved that as to
9 Paul Fleischer, then whatever Paul Fleischer said about
10 hi-jacking within the business of the conspiracy charged,
11 and during the term of the conspiracy, would bind the
12 accused. If you find that the government also proved
13 beyond a reasonable doubt that the accused knowingly
14 and wilfully entered into that conspiracy, if all those
15 conditions are not met, then disregard as not chargeable
16 against this defendant.

17 That principle talks about dealing with evidence.
18 But, before you can deal with the evidence, you must
19 first determine whether this defendant became a member
20 of the conspiracy. In order to make that determination,
21 it is only the testimony of Paul Fleischer as to the
22 conversations and transactions he says he had or had
23 with this defendant. In other words, it is the testi-
24 mony of what he said you may consider in determining
25 whether or not the government proved beyond a reasonable

1
2 doubt that he entered into the conspiracy. So first
3 determine whether the conspiracy as alleged in the
4 indictment is established. If you conclude the conspir-
5 acy existed, then determine next whether or not the
6 defendant knowingly and wilfully became a member of
7 that conspiracy, and then, if the government has proved
8 beyond a reasonable doubt that one or more of the members
9 of the conspiracy, doesn't have to prove that this de-
10 fendant performed the overt act, but one or more of the
11 members of the conspiracy performed an overt act know-
12 ingly and in furtherance of the purposes of the con-
13 spiracy. If all that is established, then the govern-
14 ment shall have proved its case. If it fails to estab-
15 lish all that beyond a reasonable doubt, then it has
16 not proved its case.

17 Now, an overt act is any act which the witness
18 has testified or of which there might be proof from the
19 exhibits that you see or hear. It might be a telephone
20 call, it could be the hi-jacking, itself, conversations
21 concerning the method of surveilling the truck to be
22 hi-jacked, picking out the hi-jacked truck; but the
23 overt act must be knowingly done. In other words, the
24 party of the conspiracy you find performed the act must
25 have been aware that he was doing it for the business of

1
2 the conspiracy, and then the further condition must be
3 shown it was something that was done to help accomplish
4 the business of the conspiracy, which in this case was
5 a hi-jacking. It might be, as I said, the picking out
6 of the truck to be hi-jacked, the actual hi-jacking,
7 the disposition of the goods, the towing of the truck
8 away, any of those matters, any of those acts could be
9 overt acts. So, the government must prove beyond a
10 reasonable doubt 4 essential elements of the crime
11 charged in order to sustain a conviction. One, that
12 the conspiracy described in the indictment was knowingly
13 and wilfully performed and was existing at or about the
14 time alleged.

15 Two, that the accused knowingly and wilfully
16 became a member of the conspiracy and either joined
17 the conspiracy after it was organized or became a member
18 at inception. It doesn't matter. That thereafter, one
19 of the conspirators knowingly committed an overt act,
20 and lastly, that such overt act was knowingly done in
21 furtherance of some act or purpose of the conspiracy.

22 Now, this defendant is charged as follows:

23 On or about and between the 1st day of January, 1972
24 and the 7th day of March, 1972, both dates being approx-
25 imate and inclusive, within the Eastern District of New

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

York, the defendants Charles Peters, Gerald Collins, also known as "Rebel", Paul Flammio, Rocco Mastrangelo, also known as "Rocky" and Joseph Adolorio, also known as "Joe Baldy", Charles Forbes and Gerald Barry, along with Paul Fleischer, named herein as a co-conspirator not as a co-defendant, and others known and unknown to the grand jury, did knowingly and wilfully conspire to commit offenses against the United States, in violation of Title 18, United States Code, Section 659, by conspiring to unlawfully take from a motor truck belonging to the Arlene Knitwear Company, Brooklyn, New York, a quantity of woman knitted garments, having a value in excess of one hundred dollars (\$100) which goods were moving as and constituting an interstate shipment of freight from New York to New Jersey, and further, to unlawfully receive and have in their possession the said garments, the aforesaid defendant's knowing the same to have been stolen.

In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, within the Eastern District of New York and elsewhere, the defendants Charles Peters, Gerald Collins, also known as "Rebel", Paul Flammio, Rocco Mastrangelo, also known as "Rocky", Joseph Adolorio, also known as "Joe

1
2 Baldy", Charles Forbes and Gerald Barry committed
3 among others the following:

4 One, in or about January 1972, within the
5 Eastern District of New York, the defendants Charles
6 Peters, Gerard Collins, also known as "Rebel", Paul
7 Flammio, Rocco Mastrangelo, also known as "Rocky" and
8 Joseph Adelorio, also known as "Joe Baldy", along with
9 co-conspirator Paul Fleischer met in Queens, New York.

10 Two, on or about March 3rd, 1972, the defendant
11 Charles Forbes had a telephone conversation with the
12 defendant Rocco Mastrangelo, also known as "Rocky", in
13 New York, New York.

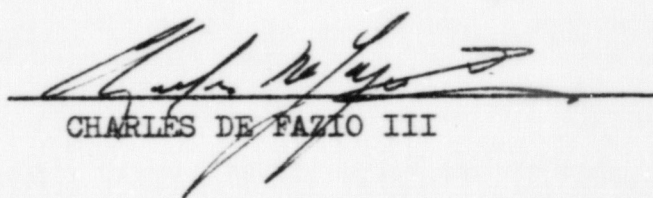
14 Three, on or about March 3rd, 1972, the defendant
15 Gerald Barry drove a tow truck from New Jersey to New
16 York, New York. (Title 18, United States Code, Section
17 371).

18 Now, you will shortly be excused to deliberate
19 on the matter before you. Each juror must decide the
20 case for himself and herself always, based on the evi-
21 dence in the case. The jury process is the deliberative
22 process. It is an exchange of views. It would be
23 improper for you to go into the jury room and decide
24 that you let somebody else do the job for you, just go
25 along with whatever the others have decided. It would

1
2 be equally improper for you to take an intransitive
3 view and refuse to discuss it with your fellow jurors.
4 If you have arrived at a verdict, and after exchanging
5 of views you find that the verdict isn't based on the
6 proper interpretation of the evidence, don't hesitate
7 to abandon the first tentative determination you make and
8 listen to your fellow jurors in the expectation and hope
9 of arriving at once that is based solidly on the evi-
10 dence and good common sense in drawing inferences from
11 the evidence. During your deliberations you will have
12 occasion to write me through your foreman. You might
13 ask for testimony. You might ask for exhibits. It will
14 take a long time locating testimony, so you will have
15 to be patient. Try to identify it by subject matter or,
16 if you can, by the witness, too. All the requests that
17 you make I take up with the lawyers, and after discussion
18 with them, I call you in the courtroom and answer your
19 requests in the courtroom. I cannot answer questions.
20 Don't ask me what a witness said. That would be my
21 interpretation, and that would be wrong, because I
22 would be poaching on your preserve. You are going to
23 ask me to read the testimony of a certain witness con-
24 cerning a certain subject matter, and you will have it
25 then as you received it originally when it was given.

CERTIFICATION OF MAILING

I hereby certify that on the 1st day of June, 1976,
the undersigned personally mailed to E. Levin Epstein, Assistant
U. S. Attorney for the Eastern District of New York, a copy of
the brief and appendix as required by law.



CHARLES DE FAZIO III